

SOME THOUGHTS ON THE METHODOLOGICAL APPROACH TO EC CONSUMER LAW REFORM

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The reform of the Consumer Acquis is underway. In this paper, I aim to contribute to the current debate by focusing upon methodological questions. In particular, I claim that - in order to understand the current problems in consumer protection - comparative private scholarship needs to broaden its horizon and develop a dialogue with public law scholars involved in the field of New Governance. I propose to rely on a methodology that I call the “hybrid approach”, a method that could bridge the current divide between private and public lawyers. I also stress the need to focus on comparative studies, an approach which promises to deliver helpful guidelines to solve the problem of the federalization of EC Consumer Contract Law.

I. CURRENT PROBLEMS WITH EC CONSUMER LAW

It is well known that the current level of consumer protection is unsatisfactory for enterprises that are still conducting business under a system of rules that is excessively fragmented within the framework of the European two-level system of governance, and for consumers, whose confidence in the internal market should be enhanced. In this paper, I concentrate, in particular, on the latter.

The latest Euro-barometer survey shows that the level of consumer confidence in cross-border trade is surprising low in Europe¹: 56% of consumers were of the opinion that, when purchasing goods and services from businesses in other Member States, businesses are less likely to respect consumer protection laws; 71% believed it is harder to resolve problems such as complaints, returns, price reductions, guarantees, etc. when purchasing from businesses in other Member

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¹ Eurobarometer (EB) (2002) No. 57.2, available at <http://issda.ucd.ie/documentation/eb/s3640cod.pdf>.

States; and 65% considered it more problematic to return a product bought by distance selling within the cooling-off period when purchasing from a supplier in a different Member State.

This data suggests that a lack of consumer confidence in the mechanisms of the single market is a crucial problem to be addressed by law reform projects now.

In the debate on harmonization of EC Consumer Law, consumer confidence has been used as a central argument. The argument has been presented in order to justify both the creation of a minimum safety net for consumers and the current turn toward maximum harmonization in consumer contracts.² European law should be harmonized, among other things, to create confident consumers who like to shop abroad and make use of the whole internal market. An example comes from the preamble of the Unfair Contract Terms Directive.³ The Proposal for a "Directive on Consumer Rights" (examined in the next paragraph) confirms the shift toward maximum harmonization of EC Consumer Contract Law. Again, this shift of policy on the part of the Commission has been defended with the consumer-confidence argument. At this stage, however, it is not clear if this is the best approach.

II. THE PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS

On October 8, 2008, the Commission issued a proposal for a "Directive on Consumer Rights" (the "Directive").⁴ The proposal is the result of a "diagnostic phase", which started with the 2004 Review of the Consumer Acquis and aimed to deal with the current problems highlighted in the previous paragraph.⁵ This phase comprised the preparation of a comparative analysis of how the eight directives which are the focus of this review have been implemented in the Member States⁶, some stakeholder workshops within the work toward the Common Frame of Reference on European Contract Law (CFR), and surveys of consumer and business attitudes. The publication of a Green Paper on 8th February 2007 concluded this phase and gave way to a

² Thomas Wilhelmsson, *The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law*, 27 J. OF CONSUMER POL'Y 317 (2004).

³ Council Directive (EC) 93/13 on unfair terms in consumer contracts [1993] OJ L95/29-34.

⁴ Commission (EC), *Proposal for a Directive of the European Parliament and the Council on consumer rights*, COM (08) 614, available at http://ec.europa.eu/consumers/rights/docs/Directive_final_EN.pdf.

⁵ The Review project was set up in the Communication on European Contract Law and the Revision of the Acquis: the Way Forward, COM (04) 651 final. The 2004 Communication was the Commission's follow-up to the 2003 Action Plan, COM (03) 68 final.

⁶ EU CONSUMER LAW COMPENDIUM (Hans Schulte-Nölke, Christian Twigg-Flesner, & Martin Ebers (eds.), Sellier European Law 2008).

consultation.⁷ The Green Paper focused on the eight directives providing for minimum harmonization. These were reviewed with the objective of identifying the shortcomings that affect all of them as well as those shortcomings that are specific to any one.⁸ After analysing the responses, the Health and Consumer Protection Directorate General issued a Report which summarizes the outcome of the consultation and a detailed analysis of the responses. By proposing its new directive, the EC Commission confirms its legislative approach by adopting a horizontal instrument that moves away from the minimum harmonization approach followed in the four existing Directives (i.e. Unfair contract terms, Sales and Guarantees, Distance Selling, and Doorstep Selling). Its proposal embraces full and exhaustive harmonization.

According to the Commission, the problem is that several of these laws date from the 1980s, and all of them set minimum standards. Since individual EU countries have adapted the rules in different ways nationally, a patchwork of laws has evolved over the last 20 years. The result is a maze of different rights and practices, from cooling off periods to guarantees, which are as unclear to consumers as they are confusing for business. Guarantees, for example, last for 2 years in one country but can be longer in others; cooling off periods last 7 working days in one Member State and can be fourteen calendar days in another. In brief, the Commission's proposal merges the main principles of the four Directives to regulate the contracts for sales of goods and services from business-to-consumer. Generally, all contracts are covered, including purchases made in a shop, at a distance, or away from business premises. It aims to put in place clear EU wide rules covering:

i) pre-contractual information.

Before concluding a contract, the Directive obliges the trader to provide the consumer with a clear set of information requirements, for all consumer contracts, so that the consumer can make an informed

⁷ Christian Twigg-Flesner, *No Sense of Purpose or Direction? The Modernization of European Consumer Law*, 3 EUR. REV. CONT. L. 198 (2007). Cristina Poncibò, *The Challenges of EC Consumer Law*, EUI Max Weber Programme Working Papers No. 24/2007 (2007), <http://ssrn.com/abstract=1028218> (last visited March 28, 2009).

⁸ The Doorstep-Selling Directive (Council Directive (EC) 85/577 [1985] OJ L372/31); the Package Travel Directive (Council Directive (EC) 90/314 [1990] OJ L158/59); the Unfair Contract Terms Directive (Council Directive (EC) 93/13 [1993] OJ L95/29); the Timeshare Directive (Council Directive (EC) 94/47 [1994] OJ L280/83); the Distance-Selling Directive (Council Directive (EC) 97/7 [1997] OJ L144/19); the Price Indication Directive (Council Directive (EC) 98/6 [1998] OJ L80/27); the Injunctions Directive (Council Directive (EC) 98/27 [1998] OJ L166/51); and the Sale of Consumer Goods Directive (Council Directive (EC) 99/44 [1999] OJ L171/12).

decision about whether or not to buy. The information must include, for example, the main characteristics of the product; the physical address and identity of the trader; the price inclusive of taxes; all additional freight, delivery, or postal charges; arrangements for payment, delivery, performance, and complaints; if applicable the existence of a right of withdrawal, or additional charges relating to deposits or financial guarantees; and the existence of commercial guarantees or after sales service.

ii) the rules on delivery and passing on risk to the consumer.

The trader must deliver the good to the consumer within a maximum of 30 calendar days from the signing of the contract. Under the new rules, the trader bears the risk and the cost of any deterioration or destruction/loss of the good until the moment when the consumer receives the good. When a trader fails to fulfill his obligation to deliver, the consumer is entitled to a refund, as soon as possible, and no later than 7 days from the date of delivery.

iii) cooling off periods.

A single EU-wide cooling off period of fourteen calendar days and the rules on the beginning of the withdrawal period are set down. The withdrawal period is extended to three months in all cases where the trader fails to provide information. An easy to use, standard withdrawal form, is also introduced. The trader must reimburse the consumer no later than 30 calendar days from the day that the consumer exercises the right to withdraw.

iv) repairs, replacement, guarantees.

A standard set of remedies available to a consumer who has bought a faulty product (i.e. repair or replacement in the first place and the reduction of the price or the reimbursement of money only in specific circumstances) is set out.

v) unfair contract terms.

The Commission's proposal contains a new black list of unfair contract terms that are prohibited across the EU in all cases, and an EU wide grey list of contract terms deemed to be unfair if the trader does not prove the contrary. This initiative is linked with the Common

Frame of Reference Project on European Private Law⁹ and, although intriguing, this ‘marriage of convenience’ is outside the scope of this paper.

III. THE COMPARATIVE SCHOLARSHIP DEBATE

The Review of the Consumer Acquis has fuelled debate among scholars¹⁰ and the new proposal will inevitably provoke the attention of legal scholars in the field.

Some authors have concentrated on the method itself used by the EC Commission by expressing doubts on the validity of the methodology adopted in the consultation process, i.e. the method of the “leading questions”.¹¹ These authors underlined that it is difficult (or impossible) to give a correct answer to such questions, without considering their contents. They also noted that many questions are interrelated and, consequently, one question cannot be answered without taking another into account. Such work considered the outcome of the question of full harmonization posed in Green Paper: 80% of businesses support maximum harmonization, whereas a majority of the consumer organizations support minimum harmonization. As to these scholars, it is striking that the Commission does not provide a percentage for this second majority (i.e. it is not clear if it is quantitatively comparable to the first figure, or to a bare majority). It seems that four Member States are also in favour of minimum harmonization; however, the Commission does not specify which Member States. They noted that it would be interesting to know whether they are the Scandinavian Member States, since they have a high level of consumer protection and may be afraid that they will have to reduce this level. On such basis, these authors concluded: “the Green Paper asks many questions, but not necessarily the right ones in our view.”¹²

Two leading private law scholars have also criticised the proposal to adopt the maximum harmonization approach. In particular, one points out the chaotic legal situation that may arise “if broad areas

⁹ PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (Christian von Bar, Hugh Beale, Eric Clive, Hans Schulte-Nölke, et al. Sellier European Law 2008).

¹⁰ For an economic perspective see Giorgio Monti, *The Revision of the Consumer Acquis from a Competition Law Perspective*, 3 EUR. REV. CONT. L., 295 (2007). See also Federica Casarosa, Lukasz Gorywoda, Agnieszka Janczuk, Cristina Poncibò, in collaboration with Prof. Fabrizio Cafaggi, *Response to the Review of the Consumer Acquis by the EUI Law & Economics Working Group* (2007), available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/law_econo_euro.pdf.

¹¹ Ruth Sefton-Green & Jacobien W. Rutgers, *Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse*, 3 EUR. REV. PRIVATE L. 427 (2008).

¹² *Id.* at 429.

of consumer contract law are harmonized without a similar harmonization of general contract law”¹³, while the other examines the position of the legislators in the Member States in dealing with European rules.¹⁴

The first commentator, Wilhelmsson, focuses on the ‘fairness issue’ by quoting the ECJ case *Freiburger Kommunalbauten* where the Court held that when assessing the unfairness of a term with regard to the Unfair Contract Terms Directive, “the consequences of the term under the law applicable to the contract must also be taken into account”.¹⁵ Consequently, the decision on whether a term is unfair has therefore to be taken by the national court in the light of its national contract law. He also presents, by giving examples, the problems that would arise from the inclusion of the Consumer Sales Directive in a full harmonization measure.

In the same perspective, one author¹⁶ notes that the process endangers the coherence of national contract law, as European (Consumer) Contract Law, in the cases governed by directive requires a ‘European interpretation’ of sometimes well-known concepts in contract law, whereas in other cases the traditional ‘national’ interpretation is maintained. He suggests that a legislator, or a judge, may accept the incoherence introduced by the European rules, or may tackle them by changing the national law in accordance with it, even in an area which is not covered by such European rules. Thus, he proposes to consider ‘spontaneous harmonization’ meaning, in his contribution, the harmonization of private law resulting from a voluntary change of national law in order to prevent inconsistency within national law. Other forms based on non-legislative instruments have also been considered.¹⁷

Whittaker, in his contribution on the difficulties that English lawyers are facing in implementing EC directives in the area of “contract law”, has noted that such a proposal might cause a reduction in the protection of consumers in some Member States, and he has considered the consequences of complete harmonization of EC Consumer Contract Law for the process of national implementation of

¹³ Thomas Wilhelmsson, *Full Harmonization of Consumer Contract Law?*, 2 Zeitschrift für Europäisches Privatrecht [ZEuP] 226 (2008).

¹⁴ Simon Whittaker, *Form and Substance in the Reception of EC Directives*, 4 EUR. REV. CONT. L. 381, 409 (2007).

¹⁵ European Court of Justice, case 237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR, 3403.

¹⁶ M.B.M. Loos, *The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonisation: On the Disturbance and Reconstruction of the Coherence of National Contract Law and Consumer Law Under the Influence of European Law*, 4 EUR. REV. PRIVATE L. 515 (2007).

¹⁷ Aurelia Colombi Ciacchi, *Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships*, 13 EUR. REV. PRIVATE L. 285 (2005).

the European rules.¹⁸ Accordingly, the author stresses that such a change would lead to a situation where the Member States would have much less “room for legislative maneuvering” in the proper integration and implementation of the directives. Whittaker concludes that the formal unification of consumer contract law protection at the European level risks adding complexity and disharmony at the national level, “to the prejudice of all users of the law and to the consumers in particular.”

IV. BRIDGING THE GAP: A HYBRID APPROACH

The ongoing process of reform opens up a wider discussion on the making of EC Consumer Law and protection. In this paper, I aim to contribute to this debate, by putting in place the methodological premises which can support the ongoing process of consumer law reform.

As a preliminary consideration, I note that a comparative approach should be further developed to analyze the various problems of the global consumption society.¹⁹ Such an approach is also essential to have a more structured and convincing approach in addressing the ongoing process of reform of the Consumer Acquis.²⁰

More important, I argue that we would be able to get a better understanding of the current problems in the field by enlarging the picture to include new perspectives: in particular, I propose to bridge the current divide between the comparative legal scholarship mentioned in the previous paragraph and “new governance” scholar. I like to quote Trubek’s words: “The word ‘new’ does not imply that it has been invented recently; rather it is used to refer to the widespread and explicit use of non-conventional forms of governing.”²¹

Actually, it seems that there is a limited dialogue between private lawyers, whose positions and arguments have been briefly summarized in the paragraphs above, and scholars from the public/administrative law field, who are working on the modes of governance.²² This lack of dialogue is a consequence of the traditional

¹⁸ Whittaker, *supra* note 14, at 409.

¹⁹ JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* (Max Pensky, trans. MIT Press 2001).

²⁰ Norbert Reich, *Transnational Consumer Law—Reality or Fiction?*, 41 UCC L.J. 1, 4 (2008). KENNETH J. MEIER, E. THOMAS GARMAN, LAEL R. KEISER, *REGULATION AND CONSUMER PROTECTION: POLITICS, BUREAUCRACY, AND ECONOMICS*, (3d ed. 2002). John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT’L & COMP. L. 1, 1 (1998). Donald B. King, *Globalization Thinking: Commercial and Consumer Law Illustrations*, 39 ST. LOUIS U.L.J. 865, 866 (1995).

²¹ Louise G. Trubek, *New Governance and Soft Law In Health Care Reform*, Univ. of Wisconsin Legal Studies Research Paper No. 1006/2005, at 10 (2005), available at <http://ssrn.com/abstract=908674> (March 28, 2009).

²² NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE US (Gráinne de Búrca & Joanne Scott eds., Hart 2006).

Private Law - Public Law divide.²³ While private lawyers usually concentrate on the harmonization of European private law²⁴, the “New-governance scholars” are developing their vision of European governance by increasingly considering the sociological and the “law in context” aspects. These scholars have both described and laid the theoretical foundation for what they see as promising and innovative efforts to address public problems²⁵; their efforts attempt to be less hierarchical, more transparent, and more democratic than traditional top-down forms of regulation.

Promising attempts to overcome this methodological limitation in the making of European Private Law come from the private law side. One author has noted the link - and the interplay - between European Private Law (“EPL”) rules and the institutional dimension of the Union. In his work²⁶, Cafaggi stresses that the attribution of regulatory power to private regulators, with the aim of pursuing the public interest, has already contributed to the creation of “regulatory hybrids”. In these cases, private regulators have generally to comply with principles of transparency, accountability, and participation typical of public regulators, significantly reducing their freedom of contract. In such a case, the basic private law principles that characterize their organizational models are significantly altered.

With specific reference to the topic discussed here, European Consumer Law cannot be easily placed within legal disciplines like Civil Law, Commercial Law, and Administrative Law, because it exceeds traditional boundaries. In particular, EC directives on consumer protection, as well as those specifically concerning consumer contracts, cut across the traditional distinction that is present in national laws between public (administrative law) and private law. Moreover, Consumer Law has to take into consideration both the individual and the collective interests of consumers and most of the measures regarding the general interests of the consumers and their collective market position. Needless to say, the particular nature of Consumer Law represents a challenge to the traditional “private law” approach, and an opportunity to experiment with new solutions to

²³ THE PUBLIC LAW/PRIVATE LAW DIVIDE: UNE ENTENTE ASSEZ CORDIALE? (Mark Freedland, Jean-Bernard Auby eds., Hart 2006).

²⁴ Luke R. Nottage, *Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law*, 1 ANN. OF GERMAN AND EUR. L. 166 (2004).

²⁵ Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008) (reviewing GRÁINNE DE BURCA & JOANNE SCOTT EDS., *LAW AND GOVERNANCE IN THE EU AND THE US* (2006) & LIZA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS* (2006)).

²⁶ FABRIZIO CAFAGGI, *MAKING EUROPEAN PRIVATE LAW: GOVERNANCE DESIGN* (Horatia Muir-Watt ed., Edward Elgar 2008); see also Fabrizio Cafaggi, *Rethinking Private Regulation in the European Regulatory Space* (2006) EUI Working Papers, 13/2006, at 10. available at <http://cadmus.eui.eu/dspace/handle/1814/4369> (last visited Mar. 28, 2009).

address the current problems briefly indicated in the first paragraph of this paper.

Within such a framework, my proposal is, thus, to adopt “a hybrid approach” in order to link the comparative private law arguments with some insights coming from the contributions about the new modes of governance. My point is that this method may help us to get a better understanding of the current problems with consumer protection as a mix of government regulation, market forces, and self-regulation. In order to present and to support my argument, I consider in the next paragraphs some fundamental questions raised by the Commission’s proposal and my goal is to find an appropriate answer to these questions by adopting the proposed methodology. In particular, apart from the introductory paragraph on the “consumer confidence” argument, I present in the next paragraphs some examples of regulatory tools to be explored and further developed in consumer protection: the role of the courts, co-regulation (i.e. standardization), and national experimentalism in consumer law and enforcement.

V. IMPROVING CONSUMER CONFIDENCE: IS MAXIMUM HARMONIZATION THE BEST OPTION?

First of all, I would like to briefly discuss the ‘puzzle’ of consumer confidence. In the debate on the need to harmonize EC Consumer Law, the concept of “consumer confidence” has been used as a central argument. A reference to the need to create confident cross-border consumers, who can contribute to the strengthening of the internal market has often been used as one of the main arguments for EC consumer policy and legislation²⁷. In the beginning the consumer-confidence argument was used to defend the idea of creating a minimum safety net for consumer protection throughout the Community. In the recent proposal for a new Directive, the European Commission is proposing to shift away from minimum harmonization to adopt a full harmonization approach. As said before, this shift of policy by the Commission has been defended with the consumer-confidence argument.

I argue that we need to broaden our understanding of the notion of “consumer confidence”. This notion comes from the domain of economic psychology and, basically, concerns a consumer’s appraisal of current economic conditions and his expectations of future economic conditions. Consumer confidence indicators were first developed by George Katona²⁸, who argued that an appreciation of how

²⁷ Wilhelmsson, *supra* note 2.

²⁸ GEORGE KATONA, *PSYCHOLOGICAL ECONOMICS* (Elsevier 1975). *HANDBOOK OF*

psychological variables influence consumers could lead to a deeper understanding of the behavior of economic agents.

The author suggests that two broad factors influence consumer decisions to buy. The first one is an objective factor: what he called ‘ability to buy’, related to traditional economic considerations.²⁹ The second one is a subjective factor that he called the ‘willingness to buy’.³⁰ This ‘willingness to buy’ is what the concept of consumer confidence tries to capture.

Since then, the role of consumer confidence in influencing consumption and economic performance at both micro and macro levels has been a subject of interest in modern economic literature, fostered by a rising level of income in advanced countries after World War II, which gave a large number of consumers significant discretionary income. For example, it is argued that the consumer will postpone discretionary purchases (items other than necessities), if he/she perceives the current state of the economy, and his/her personal situation, as being unfavorable. Even if current conditions are acceptable, but his/her expectations about future conditions are not positive, he/she will postpone discretionary purchases. To complete the picture, as to the scientific literature, the confidence of the consumer is also driven by political considerations and media coverage.³¹

Relying on this, my point here is that the confidence of consumers is the result of “a complex social construction” resulting from a series of factors; thus, in such a framework, the assumption that the consumer avoids buying in another state just because of the fact that he or she does not know the law is a clear oversimplification.

This argument is, therefore, scarcely convincing:

This conjures up a vision of a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution prevails: I must not buy this dress because I am not familiar with Italian law. Clearly she is a very sophisticated consumer, and one who by inference is familiar with Ruritanian law. Perhaps in the interest of legal science the scholar who espouses this view should take his wife shopping in the Via Condotti and see what

CONSUMER PSYCHOLOGY (Curtis P. Haugtvedt, Paul M. Herr, Frank R. Kardes eds., Psychology Press 2008).

²⁹ *Id.* at 10.

³⁰ *Id.* at 15.

³¹ Suzanna De Boef & Paul M. Kellstedt, *The Political (and Economic) Origins of Consumer Confidence*, 48 AM. J. OF POL. SCI. 633 (2004).

happens.³²

As a preliminary remark, the adoption of the new “Directive on consumer rights” will be a useful tool to reduce compliance costs for businesses and to simplify the existing legislation, but, it will probably have only a limited impact on the confidence of European consumers that may continue to be undermined by legal factors (e.g. lack of an effective enforcement), economic factors, cultural factors (e.g. linguistic barriers), and political distrust.

VI. THE ROLE OF THE COURTS IN CONSUMER PROTECTION

Some scholars have recently pointed out the interdependence between regulators and Courts.³³ In my view, this contribution deriving from the new governance debate opens up an interesting perspective in connecting two domains (i.e. the regulatory and the judicial ones) that, for a long time, have been separately considered from public law scholars. Such a perspective highlights the role of the judges, together with the Commission and the national regulators, in shaping EC consumer law and policy.

National courts have been primary actors in the task of European integration and the reasons for such intense cooperation with the European cause have been deeply investigated in both legal and socio-political terms. Compliance with EC law has been, for national judges, an experience of empowerment within their own institutional arenas. In the realm of private law adjudication, however, courts do not seem to feel bound to endorse the project of harmonization, and often take a less deferential posture towards EU mandates.³⁴ This means that the possible uniformity of the legal rules within the Consumer Acquis cannot just be created by the imposition of rules in a centralist way. An example is the “legal irritant” from Teubner’s analysis of the effect of the Unfair Contract Terms Directive on English law.³⁵ The author shows how the directive has instituted a wider process of change, the result of which is not harmonization, but the development of English law on its own conditions.

³² Roy Goode, *Contract and Commercial Law: The Logic and Limits of Harmonisation*, 7.4 ELECTRONIC J. OF COMP. L. (2003), at <http://www.ejcl.org/ejcl/74/art74-1.html> (last visited Mar. 28, 2009).

³³ Joanne Scott & Susan P. Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007).

³⁴ The Consumer Law Database is an output of a research project called “EC Consumer Law Compendium”, which is being conducted by an international research group on behalf of the European Commission. For more details, see *supra* note 7; see also http://www.eu-consumer-law.org/casedetails1_en.cfm.

³⁵ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

Consequently, legislative harmonization of consumer contract law does not in itself necessarily lead to the desired level of uniformity in the day-by-day consumer protection provided by the courts.

More important, there is an emerging dialogue between national judges and between them and the Commission that may go far beyond the bounds of official cooperation and open the way to new practices for courts.³⁶ Judicial networking for resolving consumer disputes may, for example, be developed within the framework designed by the Green Paper on Consumer Collective Redress.³⁷ The Green Paper envisages, as one of the options, the cooperation between the Member States in order to ensure that consumers throughout the Union are able to use the collective redress mechanisms that are available in different Member States. This option would also ensure that Member States, having a collective redress mechanism, open up their respective mechanisms to consumers from other Member States and that Member States, without mechanism, establish one. The Green Paper concludes that the opening up of national collective redress mechanisms could be facilitated by establishing a cooperation network, bringing together entities that have the power to bring a collective redress action in those Member States having such mechanisms, including public bodies and consumer organizations.

VII. CO-REGULATION: THE CASE OF PRODUCT SAFETY STANDARDIZATION

The Commission's approach seems to have a narrow understanding of the tools that are currently available in designing the boundaries of consumer protection in the EU.

The trend of the Commission towards full harmonization by adopting the proposal at issue is occurring in tandem with a reliance on a series of more flexible tools. I underline that such instruments have not been deeply explored in the scholars' debate on the Review of the Consumer Acquis.³⁸

The first case to be considered on such a basis is the use of co-regulation³⁹ in the process of product safety standardization. The General Product Safety Directive ("Directive") is intended to ensure a high level of product safety throughout the EU for consumer products

³⁶ Commission (EC), *Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, OJ, C10 [2004].

³⁷ Commission (EC) *Consumer Collective Redress* (Green Paper) COM (08) 794 final.

³⁸ LAW AND NEW GOVERNANCE IN THE EU AND THE US (Grainne de Búrca & Joanne Scott eds., Hart 2006).

³⁹ Fabrizio Cafaggi, *Self-Regulation in European Contract Law* (Dec. 2006), European University Institute Law Working Paper No. 2006/43, available at SSRN: <http://ssrn.com/abstract=959608>.

that are not covered by specific sector legislation (e.g. toys, chemicals, cosmetics, machinery).⁴⁰ The Directive provides a generic definition of a safe product and, if there are no specific national rules, the safety of a product is assessed in accordance with European standards, Community technical specifications, codes of good practice, the state of the art, and the expectations of consumers.

In particular, the Directive assigns a central role to standardizing bodies, involving private parties in defining product safety and Consumer organizations in representing and defending the interests of consumers in the process of standardization and certification. There are three European standards organizations: the European Committee for Standardization ("Cen"), the European Committee for Electrotechnical Standardization ("Cenelec"), and the European Telecommunications Standards Institute ("Etsi"). Thus, these bodies, where public and private actors interact, are trying to perform a task - harmonization - that has grown exponentially in recent years. This system has inevitably created a sort of "new site" of consumer interest representation, though it remains quite ineffective.

I discuss this case to underline that EC consumer protection also involves new, and less formal, mechanisms that are sometimes more practical, less costly and more flexible than - or in addition to - traditional regulation in effecting these outcomes. These mechanisms also reveal new issues to be taken into consideration by law scholars: it is clear that consumers should be involved in the standards-making process, to make them acceptable and to legitimize this peculiar form of 'regulation' that is partially elaborated by private parties. Consumers and their associations should be effectively involved in the process of standardization and, thus, they need to be represented by technical experts.⁴¹

VIII. EXPERIMENTALISM: CONSUMER COLLECTIVE REDRESS IN THE MEMBER STATES

The third and last case here examined comes from current experimentalism about consumer collective redress in the Member States.

Basically, Member States provide for an injunction procedure to protect the collective interests of consumers, as a result of the implementation in their national laws of the Directive 98/27/EC of the

⁴⁰ Council and Parliament Directive (EC) 2001/95 on general product safety, OJ L114/17 [2002], as amended.

⁴¹ Geraint Howells, *The Relationship Between Product Liability and Product Safety - Understanding a Necessary Element in European Product Liability Through a Comparison with the US Position*, 39 WASHBURN L.J. 305 (2000).

Council and the Parliament, which governs injunctions for the protection of collective interests of consumers (i.e. “Injunctions Directive”).⁴² The Injunctions Directive was introduced to address what was perceived to be a gap in the enforcement of existing consumer protection regulations. The lack of speedy remedies and relief for consumers meant that a new approach was required. After ten years, there is a growing consensus within European legal scholarship about the need to rethink the system of consumer protection designed by the Injunctions Directive.⁴³ Empirical evidence recently gathered has shown that this action is scarcely used before national courts: for example, the data available from the “EC Consumer Law Compendium” report only sixteen cases in which recourse is made to national laws implementing the Injunctions Directive.⁴⁴

Given that this instrument suffers from a series of shortcomings both at the theoretical and practical level, national initiatives concerning consumer collective redress have emerged in the last years. In this field, the experiments in the Member States are made in three main forms: the test case (England and Wales⁴⁵, and Germany⁴⁶); the model of action provided by the Injunctions Directive with some improvements (Italy⁴⁷, Spain⁴⁸, and France⁴⁹); and the model offered by the class action with some modifications (Sweden).⁵⁰

Urged by the mushrooming of national initiatives⁵¹, the European Commission started to consider the need to introduce effective mechanisms to improve the existing mechanisms⁵² and

⁴² Council and Parliament Directive (EC) 98/27 on injunctions for the protection of consumers interests OJ L166/51-5 [1998].

⁴³ Fabrizio Cafaggi & Hans W. Micklitz, *Collective Enforcement of Consumer Law: A Framework for Comparative Assessment*, 16 EUR. REV. PRIVATE L. 391 (2008). Willem H. Van Boom & M.B.M. Loos, *Effective Enforcement of Consumer Law in Europe: Synchronizing Private, Public, and Collective Mechanisms* (Jan. 2008), at <http://ssrn.com/abstract=1082913> (last visited Mar. 28, 2008).

⁴⁴ EU CONSUMER LAW COMPENDIUM, *supra* note 6.

⁴⁵ Rachel Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, 70 MOD. L. REV. 550 (2007); Rachel Mulheron, *Some difficulties with Group Litigation Orders - and Why a Class Action is Superior*, 24 CIV. JUST. Q. 40 (2004). RACHEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* (Hart 2004). CHRISTOPHER HODGES, *MULTI-PARTY ACTIONS* (Oxford Univ. Press 2001).

⁴⁶ Michael Stümer, *Model Case Proceedings in the Capital Markets - Tentative Steps Towards Group Litigation in Germany*, 26 CIV. JUST. Q. 250 (2007).

⁴⁷ Cristina Poncibò, *Consumer Collective Redress in the European Union: The Italian Case*, in *THE YEARBOOK OF CONSUMER LAW* 231 (Geraint Howells, Annette Nordhausen, Deborah Parry, & Christian Twigg-Flesner eds. (Ashgate 2009).

⁴⁸ Artículo 11. Legitimación para la defensa de derechos e intereses de consumidores y usuarios, Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

⁴⁹ L Boré, ‘L’action en représentation conjointe: class action française ou action mort-née ?’ (2005) *Dalloz*, III, chr., at 267.

⁵⁰ Group Proceedings Act (SFS 2002:599) (entered into force on January 1, 2003).

⁵¹ CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS, A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE* (Hart 2008).

⁵² Commission, Council, European Parliament and European Economic and Social

published the Green Paper on Consumer Collective Redress.⁵³

This is an important example of national experimentalism. In the words of one author: “One should not strive for a unified ‘European consumer law’ detached from national development, but rather let the development of consumer law in Europe gain from continuous experimentation at the national level”.⁵⁴ A continuous experimental development and improvement of the kind to be seen in this area - where new ideas not only flow via EC legislation, but also directly between the Member States - would naturally be much more difficult if the field were controlled by a unified European Consumer Contract Law. With reference to the domain of private law, one former Advocate-General has already noted the relevance of the “ongoing process of cross-fertilization” and “dialectical interaction” between national laws and Community Law.⁵⁵

The Commission’s proposal may endanger the opportunity for a continuing exchange of national experience that is, at the end, a solution to accommodate our diversity in the construction of European Law.

IX. FEDERALIZING EC CONSUMER CONTRACT LAW? A COMPARATIVE APPROACH

Finally, I argue that, with a view to reforming EC Consumer Law, it is necessary to study our experience in the light of the multi-level systems, where rules adopted at a higher level must be transposed and coordinated with those adopted lower down.

In this respect, the US federal system of consumer protection may provide some insights on the interplay of federal and national laws and their coordination mechanisms. I am not saying that the US system is necessarily good in terms of consumer protection. I am just stating that it presents a ‘good case’ for a comparison.⁵⁶

In brief, the United States has a system of federal and state consumer laws. Many areas are concurrently regulated at both levels, while others fall exclusively in the domain of one level.

Committee (EC) *EU Consumer Policy Strategy 2007-2012, Empowering consumers, enhancing their welfare, effectively protecting them* (‘Communication’) COM (07), 99 final, at 11.

⁵³ See *supra* note 37.

⁵⁴ Thomas Wilhelmsson, *Is There a European Consumer Law and Should There Be One?* (Rome 2000) Centro di studi e ricerche di diritto comparato e straniero, diretto da M.J. Bonell, No. 41/2000, available at <http://w3.uniroma1.it/idc/centro/publications/41wilhelmsson.pdf> (last visited Mar. 28, 2009).

⁵⁵ Walter van Gerven, *Bringing (Private) Laws Closer to Each Other at the European Level*, in *THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW* 37-78 (Fabrizio Cafaggi ed., Oxford 2006).

⁵⁶ T. Bourgoignie, D. Trubek, *CONSUMER LAW, COMMON MARKETS AND FEDERALISM IN EUROPE AND THE UNITED STATES* (Vol. 3 *Integration Through Law*) (Walter de Gruyter, 1987).

From this perspective, it is interesting to note that there is not a precise plan to establish the areas that should be regulated by “central” government or by the states, and the system is still changing and evolving over time. Some degree of diversity is allowed and the states may intervene on behalf of consumers in many areas.

The “coordination” between the United States’ federal government and the states in consumer protection operates within the boundaries set up by the ‘US commerce and supremacy clauses.’⁵⁷ In some recent cases, the legal doctrine of pre-emption has been applied by the US Supreme Court to ‘pre-empt’ state consumer litigation by federal regulation.⁵⁸ An example comes from the Court’s recent decision in *Watters v. Wachovia Bank*.⁵⁹ Michigan (along with several other states) had enacted statutes prohibiting “predatory loans”—loans with excessive fees, penalties on refinancing, kickbacks to brokers for inflating interest rates, unnecessary insurance, or other signs of abuse of consumer ignorance. In response, the Office of the Comptroller of the Currency (OCC) issued a rule stating that such state policies could not be enforced against the subsidiaries of nationally chartered banks, because, under the National Bank Act, such banks were governed exclusively by OCC’s own much more lenient policy on predatory lending. The *Watters* Court held that the OCC had exclusive power to regulate the lending practices of national banks’ subsidiaries, largely on the strength of the argument that state regulation would significantly impair national banks’ powers to use subsidiaries.

On the basis of these cases of pre-emption, an author argues that US public consumer law is experiencing a sort of “federalization.”⁶⁰

Notwithstanding these developments, the United States’ approach remains in contrast with the growing involvement of European institutions in consumer law. This divergence can be partly explained by the predominance of a market-oriented approach in the United States, which largely admits state regulation in order to adjust to the needs of economic actors.⁶¹ In contrast, the European framework

⁵⁷ A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT’L L. 1219 (2001).

⁵⁸ *Wyeth v. Levine*, no. 06-1249, 2009 U.S. LEXIS 1774 (Mar. 4, 2009): In *Wyeth*, the US Supreme Court addresses whether the Food and Drug Administration approval of warning labels precludes consumers from bringing state-law tort claims against drug manufacturers for failure to adequately warn of a drug’s risks. See also *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

⁵⁹ 127 S. Ct. 1559 (2007); see also Amanda E. Quester & Kathleen E. Keest, *Looking Ahead after Watters v. Wachovia Bank: Challenges for the Lower Courts, Congress, and the Comptroller of the Currency*, REV. OF BANKING & FIN. L., Vol. 27, No. 187 (2008), available at <http://ssrn.com/abstract=1116060>.

⁶⁰ Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663 (2008).

⁶¹ Luisa Antonioli, *Consumer Law as an Instance of the Law of Diversity*, 30 VT. L. REV. 855 (2006).

in this field - in spite of a growing emphasis on market mechanisms - is characterized by a tradition of strong regulatory market control typical of welfare states. The European system is, therefore, experiencing a “new” phase caused by the increasing relevance of other mechanisms for consumer protection, such as mass litigation before European courts.⁶²

Ideological differences represent only one of the factors at play. The kinds of organizations involved in the lawmaking and law-applying processes in the European Union and their mutual interaction are crucial in determining the actual outcomes in the field of consumer law.⁶³

Here the point is that the analysis of United States consumer law reveals a relevant degree of flexibility and interplay between federal and state rules of consumer protection.

This approach – that still needs to be fully understood by comparative legal scholars – shows, at least, that a widespread and complex problem such as consumer protection requires a combination of different legal techniques and the coordination of a plurality of lawmaking levels in order to be effective.

For example, in the United States, the regulation of terms in consumer contracts largely occurs at the state level. Two very basic doctrines affecting the use of terms are the obligation of good faith and fair dealing, and the doctrine of unconscionability. The Uniform Commercial Code provides that “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”⁶⁴ In this context, good faith can mean “honesty in fact in the conduct or transaction concerned,” but more importantly, in the case of a merchant, good faith means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” Good faith, most particularly under the latter definition that incorporates notions of “fair conduct”, can check the use of perceived unfair terms in consumer contracts. The doctrine of unconscionability acts to regulate terms by giving judges broad latitude to strike out “unconscionable” terms, or to refuse to enforce “unconscionable” contracts.⁶⁵ While comprehensive federal statutes governing disclosure of terms exist – e.g. the Truth in Lending Act – their focus usually is upon disclosure of information and terms rather than substantive

⁶² *Supra* notes 36-37 and accompanying text.

⁶³ See *supra* note 58.

⁶⁴ U.C.C. § 1-203, 1 U.L.A. 109 (1999).

⁶⁵ U.C.C. § 1-201(19) [165]. *Id.* § 2-103(1)(b); see also *id.* § 3-103(a)(4) (good faith includes not only honesty but also observance of reasonable commercial standards of fair dealing). Article 5 of the U.C.C. (Letters of Credit) incorporates the subjective state of mind standard. See U.C.C. § 5-102(a)(7), 2B U.L.A. 554 (1999). See, e.g., *id.* § 4-401 cmt. 3 (recognizing that good faith may act to limit bank's discretion in setting fees under bank-depositor contracts).

regulation of those terms.⁶⁶ Moreover, individual states may prohibit particular types of terms - state law usury statutes limiting maximum interest rates, for example, are a type of legislative regulation of terms.⁶⁷

In light of the above, much of the substantive regulation of terms in consumer contracts in the United States occurs at the state law level, often through open-textured standards such as “good faith,” with relatively nominal involvement of the federal government. Thus, with respect to the regulation of consumer contractual terms, the situation in the United States is somewhat a reversal of that seen in the European Union. The question here is: if a degree of flexibility is applied in the United States, should this not be even more attractive in the European Union where the system is much less centralized?

This experience may suggest that it is possible to have substantial diversity in levels and types of consumer law within a “federal” system, and still maintain an acceptable level of consumer protection in a ‘common market.’

X. CONCLUSION

In this paper I aim to contribute to the current debate on the reform of the Consumer Acquis by setting out an appropriate methodological approach.

I claim that private and public laws scholars need to improve their dialogue in order to have an impact in the ongoing process reform of EC consumer protection. In particular, I propose to rely on a new approach bridging the current divide between the private law debate and new governance. This is an interesting time to look at alternative governance in consumer protection. It is an opportunity to explore the implications of these alternatives and evaluate which types of regulation and governance work most effectively to achieve consumer

⁶⁶ The federal Magnuson-Moss Warranty Act (MMWA), regulates to a limited degree disclaimers of warranties and limitations of warranties in written warranties of consumer products. 15 U.S.C. § 2301-12 (1994). Under the MMWA, a designated “Full” warranty may not disclaim or limit the duration of state law implied warranties. *Id.* § 104(a). Warranties designated by the Seller as “Limited” may not disclaim state law implied warranties, but may limit the duration of such state law warranties if the limitation is conscionable and set forth in clear and unmistakable language and prominently displayed on the face of the warranty. *Id.* § 108. The MMWA thus to some degree preempts state laws that otherwise would allow disclaimers of warranties in the consumer context. *See also* 15 U.S.C. § 1639 (1994) (TILA preclusion of types of terms in certain high interest mortgages).

⁶⁷ Section 2-302 of the U.C.C. § 2-302, 1B U.L.A. 15 (1999) provides: (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

protection goals. I conclude this paper by underlining the need to concentrate more on a comparative approach, a method which promises to deliver helpful guidelines to solve the problem of the federalization of EC Consumer Contract Law.

Since consumer protection is one of the most significant areas of European Law, examining alternatives is a worthwhile effort.